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1
2 UNITED STATES DISTRICT COURT
3 CENTRAL DISTRICT OF CALIFORNIA

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5 HONORABLE DALE S. FISCHER, JUDGE PRESIDING
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8 The Sugar Association, Inc.,)

9 Plaintiff,)

10)

11 vs.)

Case No.

12)

CV 04-10077-DSF(RZx)

13 McNeil-PPC, Inc., et al.,)

14 Defendants.)

15)
16

17 REPORTER'S TRANSCRIPT OF PROCEEDINGS

18 Defendant's Motion for Judgment on the Pleadings

19 Los Angeles, California

20 Monday, April 4, 2005
21

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1 Los Angeles, California, Monday, April 4, 2005

2 2:30 P.M.

3 -oOo-

4 THE CLERK: Item number 7, CV 04-10077-DSF, The Sugar
5 Association, Inc. Vs. McNeil-PPC., Inc., et al.

6 MR. MURPHY: Your Honor, my name is Jim Murphy. I am
7 representing the Sugar Association, the plaintiffs in this case.
8 Your Honor, may I say quickly I am being -- I am admitted
9 pro hac vice, and I appreciate Your Honor's courtesy in allowing
10 me to do that.

11 MR. HURVITZ: Good afternoon, Your Honor. Mark
12 Hurvitz on behalf of the plaintiff.

13 MS. TORRES: Good afternoon, Your Honor. Diana Torres
14 on behalf of McNeil.

15 MR. ZALESIN: Good afternoon, Your Honor. Steven
16 Zalesin also appearing pro hac vice on behalf of the defendants.

17 THE COURT: All right. Well, this is an interesting
18 case. My first question is whether the Sugar Association is
19 only asserting that it has associational standing rather than
20 direct or whatever the other choice is.

21 MR. MURPHY: That's correct, Your Honor.

22 THE COURT: Okay. Thank you. Then my question to the
23 defense is why wouldn't the Sugar Association have associational
24 standing at least to seek injunctive relief?

25 MR. ZALESIN: Because, Your Honor, in this circuit

1 under the Lanham Act in the Ninth Circuit the case law has come
2 down and said that standing requirements are more rigorous than
3 some of the other circuit courts around the country have
4 interpreted them.

5 The U.S. Supreme Court has not addressed this, but the
6 Ninth Circuit has been quite explicit that in order to have
7 standing to sue for false advertising under the Lanham Act as
8 opposed to a trademark type injury, that the plaintiff must have
9 a discernibly competitive injury.

10 And that has been typically construed to be that they
11 have to be a direct competitor of the advertising defendant.

12 THE COURT: Well, I agree with you there. But I
13 didn't see a case where that was applied to an association, and
14 so I'm wondering if that law doesn't simply establish what
15 standing requirements the members of the Association must have.

16 MR. ZALESIN: Well, I think there is an absence of law
17 either way on this subject, Your Honor. I agree with you in the
18 Ninth Circuit.

19 There are two cases that have been called to the
20 Court's attention from other circuits; one from the First, from
21 the Court of Appeals, and a District Court case from the Seventh
22 Circuit with respect to the issue of associational standing
23 under the Lanham Act. None in the Ninth.

24 And I think it can't be disputed that the standing
25 requirements in those other circuits, the First and the Seventh,

1 are quite different than they had in the Ninth.

2 I agree with Your Honor, it doesn't ipso facto mean no
3 associational standing. But I think when you actually come down
4 to the allegations of a complaint in this case and you examine
5 associational standing under the *Hunt* test for the Lanham Act
6 claims that the Association here wants to bring on behalf of its
7 members, it becomes clear that they cannot meet the first prong
8 of the *Hunt* test as applied in this circuit or at least as the
9 Lanham Act is applied. And let me explain.

10 The allegations of the complaint are that my client,
11 McNeil, which markets Splenda artificial sweetener, the tabletop
12 sweetener that comes in yellow packets and you can also buy it
13 in grocery stores, through its advertising has injured the
14 members of the Sugar Association who aren't selling tabletop
15 sweeteners and packets but rather are sugar growers and refiners
16 and producers and the like.

17 So the competition between the members of the
18 Association on the one hand and the defendant in this case,
19 McNeil, on the other hand, is rather attenuated. I think the
20 circumstances might be different if this were an association who
21 represented aspartame retailers, people who sell Equal and other
22 products who are competing directly for the same consumers as
23 McNeil is competing.

24 But in this case, Your Honor, what we have here are
25 sugar growers and producers who by their own allegations, at

1 least based on the allegations of the complaint, aren't in that
2 kind of direct kind of competition with McNeil.

3 And so when you apply the rather rigorous standing
4 requirements of the Ninth Circuit to these members under the
5 associational standing test of *Hunt*, we say they haven't
6 established standing.

7 But at a minimum, the third prong of the *Hunt* test
8 which says if you need the members in the case in order to
9 decide an issue in the case such as damages, or in this case
10 injury, standing -- many Lanham Act false advertising cases
11 really rise and fall on the issue of whether the alleged false
12 advertising is going to injure the plaintiff.

13 Here the plaintiff isn't the members. It's the
14 Association. But we say -- we have denied in our answer their
15 allegations of injury to these members, and we say that we need
16 those members here to be able to test those allegations.

17 They are absent. They can't be either the first or
18 the third prong of *Hunt*. That's why we say they have no
19 associational standing.

20 THE COURT: I am with you on the third. So I will
21 look to the plaintiff to explain to me why the third element of
22 the *Hunt* test doesn't preclude the plaintiff from bringing at
23 least its damages type claims.

24 MR. ZALESIN: Did you want to hear from the plaintiff
25 now on that issue?

1 THE COURT: Please.

2 MR. MURPHY: Your Honor, it is true that most of the
3 associational standing cases that have been decided grant
4 associational standing in the context of injunctive relief.
5 There is no question about that.

6 But, Your Honor, the Lanham Act is different. And
7 the reason why the cases go the way they do is because of the
8 so-called third prong of the *Hunt* case which says that there
9 should be no associational standing if the -- if there is a
10 requirement that each member of the Association participate in
11 the case in order to establish the claim or the relief
12 requested.

13 The Lanham Act is different. It's a fairly unique
14 statute. I'm not going to say it's the only statute of this
15 sort, but it's a unique statute because it provides alternative
16 monetary remedies to an aggrieved plaintiff.

17 An aggrieved plaintiff can seek lost damages, that is,
18 its own lost profits, or it can seek disgorgement of profits by
19 the defendant. Intuitively I think it's pretty plain that it is
20 not necessary for each member of the Sugar Association to
21 participate in the case in order to prove the profits of McNeil,
22 the defendant.

23 And just, Your Honor, why -- I mean, associational
24 standing is perfect for a Lanham Act case because in the
25 liability phase the focus of the Court is on the advertising and

1 the conduct of the defendant. Well, also in a Lanham Act case,
2 somewhat unusually, so also is the focus on the defendant with
3 respect to the disgorgement of profit, remedy.

4 If I might, Your Honor, I think what the defendant is
5 trying to do is to say we don't have -- we, the plaintiff, we
6 don't have a way of proving damages; that is, of proving their
7 lost profits and our share of those lost profits without
8 involving each and every member of the Sugar Association.

9 That just isn't so, Your Honor. I can and I would be
10 glad to explain at least one way that we can do that.

11 The starting point are the profits of McNeil. We
12 don't claim, Your Honor, and obviously you don't need the
13 Association members to know what the profits of McNeil are. We
14 don't claim that we are entitled to all of those profits. There
15 has to be an allocation.

16 By way of example, one allocation is McNeil also
17 competes with the artificial sweeteners, the Equals and the
18 Sweet 'N Low's. They compete with us also. So we are entitled
19 to a portion, but that portion is a portion of the sugar
20 industry.

21 You don't need the sugar industry -- you don't need
22 the Sugar Association members to know what the sales are of the
23 sugar industry compared to the sales of the artificial
24 sweeteners. Sales of the U.S. sugar industry are kept by the
25 Department of Agriculture. They are also kept interestingly by

1 the Sugar Association.

2 Indeed even if you need -- and I'm not sure you do and
3 I'm not sure whose burden it is to know the sales of each member
4 of the Sugar Association -- that information is maintained by
5 the Sugar Association itself.

6 And so we don't -- I mean, all I am saying at this
7 stage, Your Honor, is that we believe we can demonstrate
8 monetary loss based on McNeil's profits without necessarily
9 involving and requiring the participation in each and every
10 member of the Sugar Association.

11 The Supreme Court has said that this third prong of
12 *Hunt* is not a requirement of case or controversy, but is what
13 they call prudential.

14 THE COURT: Jurisprudential.

15 MR. MURPHY: Jurisprudential. Thank you, Your Honor.

16 And I think Justice Souter in one of the cases
17 characterized it as a matter of administrative convenience. So,
18 Your Honor, I think, though, it's the question for you.

19 And I think -- I think I would like to tell you what
20 the answer is, but I think for you is -- the question is are you
21 going to at this point in time say there is no way, given the
22 Lanham Act's particular statutory monetary remedy based on
23 McNeil's lost profits, for us to demonstrate a monetary remedy
24 that you would find appropriate without involving each and every
25 member of the Sugar Association.

1 We think we can do that, and we think we should be
2 allowed to do it.

3 THE COURT: Well, I think what the Court was saying
4 was that Congress could decide to eliminate the third prong, not
5 that Judge Fischer could decide to eliminate the third prong
6 from the analysis.

7 MR. MURPHY: Your Honor, I'm not suggesting -- I
8 understand what you are saying in that *United Food* case where in
9 fact Congress did say that -- eliminate the third prong. I'm
10 not saying the third prong is eliminated here at all. What I am
11 saying is we can work within the third prong.

12 In order to establish damages, we do not have to
13 involve -- we do not require the participation of each and every
14 member of the Sugar Association. And the reason is because we
15 are not going to try to show the lost profits of each and every
16 member of the Sugar Association.

17 We are going to base our monetary remedy on McNeil's
18 profits, and that's a remedy that the Lanham Act statutorily
19 provides, and that is different. It is not normal.

20 THE COURT: But what do I do with the money when I get
21 it, assuming for the moment that you prevail?

22 MR. MURPHY: Your Honor, the money that -- we have
23 taken care of that, Your Honor.

24 THE COURT: Good. How have you done that?

25 MR. MURPHY: Well, what we did, Your Honor, and we did

1 this just recently, and I apologize for this. I didn't quite
2 know how to handle this, frankly.

3 But just a few days ago after some discussion, the
4 members of the Sugar Association and the Sugar Association
5 itself entered into what we call a joint allocation agreement.
6 And it basically is an agreement among the Sugar Association and
7 its members as to how any damage -- damages awarded to the Sugar
8 Association will be allocated among its members.

9 And I can -- I would be delighted to hand this up and
10 give it to opposing counsel. But essentially the Sugar
11 Association had been in operation since the mid 1940's. They
12 have a formula for assessing dues on an annual basis. The
13 formula by which they do that is their relative sales, one
14 against the other.

15 In other words, everybody pays their proportionate
16 sale of the annual cost of the Sugar Association based on their
17 relative shares of sales. They have effectively agreed to
18 allocate among themselves, and the Sugar Association has agreed
19 to do this as well, that any damages awarded will in fact go to
20 the members in the same proportions.

21 THE COURT: Are the members of the Sugar Association
22 all of the sugar growers, producers, whatever, in the country
23 or, for that matter, the world?

24 MR. MURPHY: Let me take the last part first. Not the
25 world for sure, and we aren't seeking worldwide damages. We are

1 seeking damages based on U.S. profits.

2 THE COURT: Well, that doesn't mean sugar growers
3 wouldn't send sugar to the United States.

4 MR. MURPHY: No. But the sales -- sales in the U.S.
5 sugar market are maintained by the Department of Agriculture.

6 I'm just drawing a blank. Your question was -- and I
7 apologize.

8 THE COURT: Are all of the sugar growers in the
9 United States members of the Association?

10 MR. MURPHY: Thank you. They are not. But 17 of the
11 18 processors of sugar in the United States are members. There
12 is only one processor of sugar, C & H Sugar Company, which is a
13 substantial entity, is not a member.

14 So we think, once again, based on industry
15 information, we can -- and what you are essentially talking
16 about I think is allocating among the sugar people, what portion
17 should go to the Sugar Association. And that can be done
18 because the Sugar Association members comprise such a very high
19 percentage of the sugar market in the United States.

20 And once again, all you are talking about, we believe,
21 is sales information, and the Sugar Association itself has that
22 information. So we don't think, and as we build up our damage
23 case and assuming it satisfies Daubert and all the rest, we
24 don't think that there is a requirement that each -- that the
25 participation of each member of the Association is

1 indispensable. And that's the standard the Supreme Court has
2 set.

3 We are not saying do away with the third prong. We
4 are saying we can work within that third prong.

5 THE COURT: Well, it's interesting to think of if it's
6 jurisdictional whether the parties can even create -- sort of
7 eliminate the issues by stipulation, much less eliminate one of
8 the 18 sugar producers. And it seems like there is a whole
9 other industry out there that is maybe the actual competitors
10 that you agree is in this mix somewhere, but not in your
11 lawsuit.

12 MR. MURPHY: Well, we are actual competitors with
13 Splenda. Their advertising, Your Honor, says they take sales
14 away from the sugar industry. And the Sugar Association since
15 the 1940's has been the representative of the sugar industry in
16 the United States.

17 So, I mean, I heard counsel say that, and frankly I
18 don't think that's in their moving papers, that they are -- that
19 they said they were not competitors of ours. But they are
20 competitors of ours for sure.

21 THE COURT: All right. Well, I will have to look at
22 your allegations and see.

23 MR. MURPHY: To address your other point, I don't
24 think that -- I think what the third prong is saying is that as
25 a matter of jurisprudential, you know, or administrative

1 convenience, however you want to put it, the Court's discretion,
2 if the participation of every member of the Association is
3 required, for example, to make a damage claim, then it doesn't
4 make any sense to have associational standing for a damage
5 claim. It's more a common sense proposition.

6 But if the damage claim can be made out without
7 requiring the participation of every member of the Association,
8 that is all that the third prong requires for us to go forward.

9 And, Your Honor, and I do earnestly suggest to you
10 that because of the Lanham Act alternative damage measurement of
11 McNeil's profits, it really does create a very different
12 paradigm for what you have to know in order to make a
13 monetary -- a successful monetary damage claim, and that's
14 really the essence of what we are trying to say to Your Honor.

15 THE COURT: Well, it does suggest to me, though, even
16 if you are right, that there are parties missing from this
17 lawsuit. C&H is missing.

18 MR. MURPHY: There are parties who could join this
19 lawsuit, to themselves make a claim for damage over and above
20 and separate from ours for sure. Although I should also say,
21 Your Honor, there is another lawsuit going on in the federal
22 court of Pennsylvania brought by one of the artificial sweetener
23 companies. But the reason --

24 THE COURT: I want to get mine there quick before they
25 get theirs here.

1 MR. MURPHY: Right. The reason why I was talking
2 about these allocations earlier is because we are not intending
3 to claim that we are entitled to all of McNeil's profits from
4 the sale of Splenda. The fact that other people could bring
5 lawsuits and claim their share is -- of McNeil's profits is, I
6 suggest, Your Honor, no good reason why we shouldn't be allowed
7 to proceed and try to get our share.

8 THE COURT: Well, I assume that's true in general for
9 cases where disgorgement is a remedy that one of many potential
10 plaintiffs could bring such a claim. For all these statutes
11 that you suggest are similar, are there any cases under those
12 statutes where the plaintiff has asserted associational standing
13 and monetary remedies of any kind?

14 MR. MURPHY: Your Honor, there is certainly no Lanham
15 Act case that talks about the availability of, you know, of an
16 association seeking monetary relief. No question about that.

17 In fact, I think as opposing counsel said, we've only
18 found -- and I don't think they've found any cases. We have
19 only found two, and they have found none that talk about
20 associational standing in the context of injunctive relief, and
21 both go our way happily.

22 THE COURT: Well, injunctive relief?

23 MR. MURPHY: On injunctive relief; correct. There is
24 none on the damage side one way or the other.

25 THE COURT: In this or a similar -- I assumed that was

1 true because you didn't cite them to me.

2 MR. MURPHY: Right. And I don't know of others in
3 similar circumstances, but I will have to admit to you in candor
4 I don't think we looked for every conceivable lost profit
5 statute. There, of course, are not very many statutes that
6 provide that kind of remedy.

7 THE COURT: Okay. Tell me about the state statutes
8 after Prop 64 and what I'm supposed to do with those.

9 MR. MURPHY: It's an interesting -- and I would not
10 suggest to Your Honor that it was an easy question. There is no
11 question that Proposition 64 created higher standing
12 requirements for the UCL. No doubt about that.

13 But I think what Your Honor has to focus on, or I hope
14 Your Honor would focus on, was to look at what the language is
15 after the Proposition 64 and then to analyze whether, given that
16 language, associational standing is appropriate, assuming the
17 traditional standards for associational standing can be met.

18 And here is what I mean by that. Prior to Prop 64,
19 the standing rule for the UCL was so liberal that, you know, the
20 use, for example, of the *Hunt* three prong test, you know, was --
21 I doubt if it was ever considered.

22 But the language you have afterward which is any
23 person who has suffered injury in fact and has lost money or
24 profit, that is language that is very similar to a lot of other
25 statutes, including the Lanham Act and the Maryland Disability

1 Act.

2 So when you look at that new language and you say was
3 the intent of Prop 64 to just obliterate associational standing
4 with respect to the UCL, or was it to require going forward,
5 that the three prong *Hunt* test which the Supreme Court of
6 California adopted in the *Teamster* case was to be applied.

7 In other words, it's tougher to get in on
8 associational standing than it was before, but if you satisfy
9 the three prong *Hunt* test, you can do that.

10 We think that makes sense because of the language of
11 the statute, and also because, Your Honor, I think it's fair to
12 say that California has been receptive and the *Teamster's* case
13 is one of those cases that it has been receptive to
14 associational standing so long as the three prong *Hunt* test, you
15 know, can be satisfied.

16 And so, Your Honor, I'm not saying to Your Honor this
17 is an easy question, because of course Proposition 64 did change
18 things. And we know of no ruling by a California court, state
19 or federal, on the question that is before Your Honor at this
20 time.

21 But we think if you look at the new language, the
22 traditional standards for associational standing, you will see
23 that associational standing still makes sense so long as the
24 *Hunt* standards can be satisfied.

25 THE COURT: What would you think of the Court's simply

1 declining to exercise supplemental jurisdiction over the state
2 law claims?

3 MR. MURPHY: Your Honor, we would hope that you would
4 continue to exercise supplemental jurisdiction over those
5 claims.

6 THE COURT: Only if I find in your favor when I
7 interpret them, I assume.

8 MR. MURPHY: Well, yes, I guess I have to agree with
9 that. But I think if you were going to do anything in this
10 regard, it might make sense to stay your ruling on this
11 question.

12 I strongly suspect that the California courts, the
13 state courts, are going to have to address the very question
14 that is before you right now; that is, whether Prop 64
15 obliterated all associational standing for the UCL.

16 Having the case go forward now without your ruling on
17 that -- on that specific issue does no harm. I mean, the
18 discovery in this case is going to be the same. The process in
19 the case will be the same.

20 There will be a time, and I suspect in the not too
21 distant future, when the California courts will enlighten on
22 this issue. And when that happens, for good or bad for me, I
23 think that would be the appropriate time to rule.

24 I mean, I can understand -- I mean, you know, we think
25 we are right in the way the argument is going to play out here,

1 but I would be dishonest if I didn't tell you that, you know,
2 who knows? I mean for sure.

3 But we think the way to do it rather than just deny
4 supplemental jurisdiction is to stay your ruling because I don't
5 think it's going to change anything going forward. There will
6 come a time when the ruling will be required, but I don't think
7 it's now.

8 THE COURT: All right. In view of the fact that you
9 are only asserting associational standing, is there any reason
10 that I should give you leave to amend if I were to dismiss any
11 of the claims? Something you think you can assert that you
12 haven't already asserted?

13 MR. MURPHY: Your Honor, if you were to deny -- I
14 perish the thought -- our ability to go forward based on
15 associational standing with a damage claim, it may be that some
16 of the individual members of the Sugar Association would want to
17 join as plaintiffs.

18 I truly cannot tell you right now whether that would
19 be the case or not. I simply don't know. But in our papers, we
20 held out that thought.

21 And so if you do rule against us, we would at least
22 like to have some period of time when I think rather -- I think
23 we characterized it as an amendment to the complaint. The more
24 I thought about it, I think it's more leave to intervene because
25 it would be a new party and to give us some period of time for

1 the individual members to decide if they want to intervene and
2 assert individual damage claims.

3 THE COURT: Okay. Thank you.

4 MR. MURPHY: Thank you, Your Honor. I appreciate the
5 time.

6 MR. ZALESIN: Your Honor, can I make a few brief
7 points?

8 THE COURT: Please.

9 MR. ZALESIN: Let me start with the UCL claim, Your
10 Honor. I will try to work my way backwards. I think we
11 disagree with the plaintiff in terms of whether this is a
12 difficult question or an easy question.

13 THE COURT: Don't tell me it's easy because I don't
14 know which way I'm going on it.

15 MR. ZALESIN: Let me tell you what makes it easy for
16 us.

17 THE COURT: Okay.

18 MR. ZALESIN: Mr. Murphy has asked you to look at the
19 language of the statute after the amendment. He has ignored the
20 language of the statute before the amendment.

21 Before the amendment the statute said a suit can be
22 brought by any person acting for the interests of itself or its
23 members or the general public. And in enacting Prop 64, the
24 California voters struck out "or its members."

25 If you grant associational standing in this case, I

1 can't imagine what effect we are giving to the statutory change
2 where they struck out the words "or its members." Prop 64
3 wasn't just about doing away with these private Attorney General
4 suits where a lawyer has no real client who is affected.

5 That was obviously one very important thing, but the
6 actual changes to the statute explicitly did away with
7 associations suing for their members.

8 THE COURT: Nobody provided me with the voter
9 materials. Have you looked at them? Are they not helpful?

10 MR. ZALESIN: I have, Your Honor, and they do not
11 speak explicitly to this. But it is useful to look at the
12 proposition itself because it's just a very powerful visual
13 impact that it makes when you see the -- you know, the -- sort
14 of the red line version.

15 THE COURT: I have seen that, and I understand your
16 point. And, frankly, at first glance I agreed with you. And
17 then in fact you look at the phrase before that, and it
18 indicates that government prosecutors can sue based on the
19 complaint of any person, corporation, association, et cetera.
20 And then in the very next clause it says "or the suit can be
21 brought by a person."

22 MR. ZALESIN: Right.

23 THE COURT: So you look at it and say, well, they knew
24 how to list all those things. If they wanted to give all those
25 groups standing, and they didn't -- but then I can't imagine

1 that the statute doesn't allow a corporation which has been
2 directly harmed which is certainly possible not to sue.

3 So I don't think I could interpret "person" to mean
4 literally a human being.

5 MR. ZALESIN: We would agree with that. I think the
6 word "person" is typically interpreted to encompass legal
7 entities other than human beings.

8 THE COURT: Generally including associations, though.
9 That is, I think, the problem.

10 MR. ZALESIN: Well, an association that was directly
11 competing with the advertiser which was injured in its own right
12 and which had suffered injury and had lost money or property
13 would be a person that could bring a suit.

14 But what an association can't do is bring a suit on
15 behalf of its members because that's exactly the language that
16 the voters struck out of the statute before Prop 64. In that
17 regard we regard this as a straightforward question.

18 THE COURT: Do you suggest that I go right to that as
19 opposed to the plaintiff's suggestion which is well, it's not
20 really ambiguous because "person" is defined elsewhere in the
21 law so you don't go anywhere else?

22 MR. ZALESIN: Your Honor, we think it is appropriate
23 when there has been a change, whether it be a legislative change
24 or a change by virtue of voter initiative. And I think the law
25 in California is clear that they should be interpreted and

1 analyzed the same way.

2 When legislators or voters strike words out of a
3 statute, a court is in effect bound to give effect to that
4 action on the part of the party that is acting, whether it's the
5 legislature or the voters. And to just read it back in would be
6 to effectively disregard that aspect of Prop 64.

7 THE COURT: Do you agree that I should not decline to
8 exercise supplemental jurisdiction?

9 MR. ZALESIN: Your Honor, either result would be
10 satisfactory to the defendants. The result that we would
11 discourage is the result that Mr. Murphy just advocated that you
12 simply hold off making a ruling. He says that we are going to
13 have a decision by the California courts very promptly on this.

14 Let me remind Your Honor that in all the years that
15 the Lanham Act has been around, we found exactly two cases,
16 false advertising cases in federal jurisprudence, where this
17 issue of associational standing to raise a false advertising
18 claim has come up.

19 I don't know what makes anyone think that this issue
20 is going to pop right up out of the California appellate courts.
21 It could be years or decades before that issue is settled. So a
22 stay doesn't seem appropriate.

23 A ruling on the merits would be appropriate. A
24 discretionary refusal to exercise supplemental jurisdiction
25 would be appropriate as well.

1 THE COURT: Then we would know that it would get to
2 the state court and we would have a ruling on it, "we" meaning
3 the State of California because this may be one of the very few
4 cases.

5 I tend to agree with you on that, that cases alleging
6 the kind of associational standing and the kind of association
7 in this case probably will be few and far between.

8 MR. ZALESIN: I agree, Your Honor. Although I don't
9 know that we would find the Sugar Association going across the
10 street to -- sorry. In New York they are across the street.
11 Going to court to file a similar action, depending on what
12 happens in the Lanham Act -- in the Lanham Act claim.

13 Let me turn back to the Lanham Act, if I could, Your
14 Honor. We haven't seen this allocation agreement, but without
15 seeing it, I am pretty confident I can tell you it doesn't
16 address our concerns.

17 First of all, there are many cases which say that when
18 an association is suing on behalf of its members, it can't get
19 damages or any other form of monetary recovery. That goes back
20 to the Supreme Court's decision in *Warth vs. Seldin*.

21 There is the *United Union of Roofers* case in the Ninth
22 Circuit. This is in effect a black letter rule that an
23 association, if it has standing, can only go for injunctive
24 relief, not for monetary relief.

25 And no case from any jurisdiction has been called to

1 your attention to hold otherwise with the exception of the
2 *United Food* case, but that was a situation where Congress
3 explicitly said that the union can sue for the damages of its
4 individual members. That's not the case here.

5 Now, the plaintiff has suggested to you that the
6 Lanham Act has language in it that operates in a similar way to
7 the language in the statute at issue in *United Food*, and that is
8 the disgorgement section of the Lanham Act which authorizes
9 either damages or disgorgement of the plaintiff's profits.

10 Frankly, we think the plaintiff has read far too much
11 into that section of the Lanham Act. It is not a section which
12 authorized a punitive type remedy where whoever gets to court
13 first gets a windfall and the plaintiff has to disgorge all of
14 its profits associated with its business or its advertising.

15 In fact, the statute itself explicitly says otherwise.
16 It says that disgorgement shall in all cases be compensation,
17 not a penalty for the injuries allegedly suffered or rather for
18 the wrongful conduct by the defendant and the injuries allegedly
19 suffered by the plaintiff.

20 THE COURT: In other words, it would have to be
21 disgorgement of the profits attributable or that otherwise might
22 have gone to that particular entity?

23 MR. ZALESIN: Exactly right. It's a compensatory
24 remedy, not a punitive one.

25 And in order to prove that they are entitled to

1 compensation of that sort, just like in every other damages type
2 statute or damages type case, they have to come forward and
3 prove that they suffered actual monetary losses as a result of
4 the alleged false advertising.

5 We don't have the members here. There is no way to
6 figure out whether in fact that is the case.

7 And in terms of the assertion that the -- there are
8 sales figures for the United States sugar industry available --
9 first of all, those aren't the sales figures that particularly
10 matter.

11 But just to show you why we need the members here, the
12 sugar industry has been losing sales for years, not because of
13 Splenda but because of the Atkins diet and obesity and diabetes,
14 and there are lots of reasons why people want to limit their
15 sugar intake.

16 So to say, "Here are our sales; here is what they were
17 in 1999; here is what they are today. Pay up." That doesn't
18 even begin to make any sense.

19 Even if you go beyond that, though, now they say,
20 "Okay, well, here is our declination in sales in sugar so give
21 us the money, and we will decide how we are going to divvy it
22 up." We haven't seen any law that says that that is
23 appropriate.

24 As Your Honor correctly pointed out, they don't
25 represent the entire United States sugar industry. C&H, if it's

1 not the largest, it is certainly one of the largest sugar
2 companies. They don't represent foreign sugar producers who
3 struggle to compete with them while they have all these price
4 protections and tariffs and everything else that makes it
5 difficult.

6 They don't represent manufacturers of artificial
7 sweeteners other than sucralose like aspartame and saccharine
8 and others. So there is simply no way that by entering into a
9 contract amongst themselves they can cure the clear defect in
10 their damages case.

11 And finally, Your Honor, I would say that it goes even
12 further than that. As I alluded to a moment ago, we think that
13 the competition, if you will, between McNeil on the one hand and
14 the sugar growers on the other hand is attenuated at best. They
15 grow sugar.

16 They sell it to Hershey's and Coca-Cola and other
17 companies that put it in their products. They sell it to other
18 refiners and packagers that then sell it and put it in little
19 white envelopes, and it winds up on your restaurant table. But
20 it's not the kind of direct competition that the Ninth Circuit
21 has required for standing in Lanham Act false advertising cases.

22 So how do we know not only how much injury but whether
23 any of these individual members has suffered any injury by
24 virtue of the advertising that they challenge. We dispute that
25 in the complaint.

1 We are entitled to bring them into court and challenge
2 them on those assertions. They are not here. We can't do that.
3 They shouldn't have associational standing.

4 THE COURT: Thank you. Anything further from
5 plaintiff?

6 MR. MURPHY: Your Honor, may I have a couple of
7 minutes?

8 THE COURT: Yes.

9 MR. MURPHY: Just two points, Your Honor. First with
10 respect to the California statute and the effect of Proposition
11 64, we are not suggesting just reading back in the language that
12 was taken out at all. What we are suggesting, Your Honor, is
13 that the very liberal standing that did not require satisfying
14 the three prong *Hunt* test that existed prior to Proposition 64
15 has been changed and now associational standing still exists.

16 But it exists in a more stringent environment; that
17 is, the need to satisfy Proposition -- I mean, satisfy the three
18 prong *Hunt* test. So we are not doing that.

19 I also think, Your Honor, that in terms of -- this is
20 a bit of kibitzing. In terms of whether and when a case will
21 come up in the California courts, I don't think it's limited to
22 Lanham Act claims. I think cases will arise fairly promptly, I
23 would expect.

24 Whether under -- whether after Proposition 64 there
25 can be any form of associational standing under the UCL, that is

1 really the question that is before you, whether it's been
2 totally obliterated or not. So whether it's Lanham Act or
3 diddily-do, there is going to be cases of associational
4 standing.

5 Secondly, Your Honor, with respect to the damage
6 claim, what the plaintiff is -- I am sorry. What the defendant
7 has articulated to you or tried to articulate --

8 THE COURT: You are usually on the defense side.

9 MR. MURPHY: I am. I hate to admit it. One of my
10 fates in life.

11 Your Honor, is the different kinds of allocation that
12 have to take place. We are not claiming, and I tried to say
13 this as clearly as I could. I didn't get it across. We are not
14 claiming that we are entitled to all of McNeil's profits.

15 We realize there have to be allocations for other
16 artificial sweeteners. There have to be allocations for people
17 who aren't members.

18 But what you don't have to allocate for is maybe over
19 time the sugar industry has had declining sales. It's not our
20 sales that count here. It's their profits. That's the bedrock
21 base from which the damage calculation proceeds.

22 The purpose of the joint allocation agreement is only
23 to say to Your Honor once you do all the other allocations and
24 you get to the point where the sugar industry and its members
25 are entitled to X dollars, now, of those X dollars, how will

1 those dollars be allocated among the 17 members. That's what
2 the joint allocation agreement does.

3 And I apologize for not giving it to you, Steve. I
4 will give it to you right away.

5 MR. ZALESIN: Appreciate it.

6 MR. MURPHY: Thank you, Your Honor.

7 THE COURT: All right.

8 (Proceedings adjourned at 3:12 p.m.)
9
10
11

12 CERTIFICATE

13 I hereby certify that the foregoing is a true and correct
14 transcript of the stenographically recorded proceedings in
the above matter.

15 Pamela A. Seijas
16 Pamela A. Seijas CSR No. 3593
Official Reporter

7-26-05
Date

EXHIBIT 32

REDACTED

EXHIBIT 33

REDACTED

EXHIBIT 34

REDACTED

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of August, 2005, the attached **REDACTED PUBLIC VERSION OF DECLARATION OF STEVEN A. ZALESIN** was served upon the below-named counsel of record at the address and in the manner indicated:

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/s/ John G. Day

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